



**Submission to Multistate Tax Commission Uniformity Committee – Wayfair Implementation and Marketplace Facilitator Work Group**

To: Richard Cram

From: AT&T

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AT&T appreciates the opportunity to participate in the MTC Uniformity Committee Wayfair Implementation and Marketplace Facilitator Work Group. We hope this effort will lead to an understanding of the issues in a white paper to be considered by the Uniformity Committee. We also hope that the white paper will be helpful in the efforts of NCSL as they develop model framework and uniformity in the enactment and/or updating of marketplace facilitator collection legislation in the states.

At your request we are submitting in writing the issues we have related to the “Prioritized Issues List” and have included number in which they were ordered in AT&T’s letter of 8/28/19. Each of the categories had multiple issues laid out within them, so we’ve copied the MTC language first and then addressed the relevant concerns within them. Many of the issues noted were also raised to the NCSL Taskforce also.

**1. The Definition of a Marketplace Facilitator (AT&T #2)**

*State statutory definitions of “marketplace facilitator/provider” fall into two roughly equal categories: the “narrow” definition vs. the “broad” definition. Can more uniformity be achieved in this definition?*

*Should the definition of “marketplace facilitator/provider” contain exclusions for: advertising, payment processing, food delivery services, online travel companies, others?*

Several of the bills enacted in states contain a very broad definition of a marketplace facilitator such that they may capture companies merely because they own internet backbone infrastructure, communications or broadcasting networks over which advertising is provided. They may also potentially define more than one marketplace facilitator per transaction.

The definition does not require the facilitator to have either a direct or indirect connection to the payment for any transaction that ultimately may occur. More recent legislation has started to address this concern with respect to internet advertising but does not necessarily address advertising over the communications and broadcasting networks that do not use the internet.

**2. Who is the retailer? (AT&T #7)**

*Should marketplace facilitator/providers have the same rights as retailers under state law, such as claiming price adjustments, bad debt deductions, vendor compensation (if provided by the state), etc.?*

*Should refund procedures be outlined? Who does the customer file a refund claim with and who handles the refund claim?*

Marketplace facilitators should have the same rights and obligations as the sellers and in fact should “step into the shoes” of the marketplace seller.

### **3. Remote seller and marketplace seller vs. marketplace facilitator/provider recordkeeping, audit exposure and liability protection (AT&T #5)**

*Enacted marketplace facilitator/provider collection laws generally provide that the marketplace facilitator/provider is the party to be audited, not the marketplace seller, on facilitated sales transactions. However, some of those laws also impose recordkeeping requirements on marketplace sellers for facilitated sales and subject the marketplace seller to audit under certain circumstances (such as when the marketplace facilitator/provider can establish that its failure to collect was due to erroneous information provided by the marketplace seller). Such laws may include liability protection for the marketplace facilitator/provider when the failure to collect is due to incorrect or insufficient information provided by the marketplace seller, in which case the marketplace seller assumes the liability for failure to collect. Some of those laws only include such liability protection for “incorrect” information provided by the marketplace seller. Do clearer, simpler standards need to be put in place (such as defining the specific information the marketplace facilitator/provider can rely on for the marketplace seller to provide, and vice versa) in assigning liability for failure to collect between the marketplace facilitator/provider and the marketplace seller and in determining which party is subject to audit under what circumstances?*

*If liability protection for errors is provided to marketplace facilitator/providers, should it also be extended to marketplace sellers?*

*See NACSP suggestions under “Maintaining Records” and “Audit Issues.”*

Audit exposure and liability should be limited to the party responsible for collecting and remitting the taxes. Absent a contractual agreement or a waiver, this would be with the marketplace facilitator. The marketplace facilitator also has the burden to show states that it attempted to collect accurate and sufficient information needed to remit taxes imposed. Without these limits there can be lengthy audits and costly litigation with multiple parties and the states.

Marketplace sellers have additional recordkeeping requirements to reconcile when marketplace facilitators have remitted the tax on each of their transactions. See the response to the section regarding standards of information that the seller must provide versus what the facilitator must determine.

### **4. Marketplace seller-marketplace facilitator/provider information requirements (AT&T #3)**

*In situations when the marketplace seller retains responsibility for tax compliance, should the marketplace seller receive adequate information from the marketplace facilitator on marketplace transactions to allow for compliance with other tax laws? Should clear guidelines exist as to the information each party must provide to the other in order for the obligated party to correctly collect and report tax?*

#### **Standards for Information that Seller Must Provide Versus What Facilitator Must Determine**

Many of the bills relieve the marketplace facilitator of liability if the seller provides incorrect, or insufficient information. There are no standards on what constitutes “incorrect or insufficient information”. There are also no standards on what determinations are solely the responsibility of the marketplace facilitator. This is in contrast with the strict standards that apply to Certified Services Providers (CSPs) in many of the same states. Under those arrangements the seller is required to provide detailed information about their product and service and map that to the CSPs product codes/categories. Once that mapping has been completed, it is the CSPs responsibility to know the taxability rules that apply to each of those classifications in the various taxing jurisdictions. This would include, whether it is taxable or exempt, and the jurisdictions taxing rates, boundaries and sourcing



rules. The same clarity and certainty should be set forth in these bills so that the sellers know the information they need to supply to ensure they will not be held liable for any errors that may occur after that information has been provided.

#### **5. Collection Responsibility Determination (AT&T #1)**

*Should the marketplace facilitator/provider and the marketplace seller, under certain circumstances (such as when the marketplace seller has already been collecting the tax, etc.), be able to contractually agree which party has the sales/use tax collection obligation?*

*Should the state tax agency have the authority to waive the marketplace facilitator/provider collection requirement in certain limited circumstances? Would such an authorization raise any “unlawful delegation” concerns?*

*Should marketplace facilitator/provider collection requirements apply to certain services (such as telecommunications services, which may involve other applicable taxes that the marketplace seller is better situated to handle compliance for)?*

*When the sales transaction triggers other applicable taxes, besides sales/use tax, which party (marketplace facilitator/provider or marketplace seller) should be responsible to collect?*

#### **The Inclusion of Services Subject to Multiple Tax Types and/or Simultaneously Occurring in Multiple Jurisdictions**

One primary concern of the telecommunications industry is that current legislation addresses only state sales/use taxes and does not address other government imposed federal, state, or local taxes and fees.

Legislation that includes services that are subject to multiple types of federal, state or local transaction taxes and fees can create issues when only state and local sales taxes are covered by these requirements. These issues include:

- Determination of the proper sales tax base. Other taxes or fees may be required to be calculated and included in the sales tax base;
- The potential loss of the ability to collect the special taxes and fees from the customer, such as 911 fees and federal and state universal service fund charges may be jeopardized when the seller no longer has a connection to the financial transaction;
- Potential customer confusion and administrative complexity will result if two different entities are responsible for collecting various taxes and fees on the same transaction.
- Further confusion and complexity for business invoices with recurring charges for services that are received in multiple states when all states don't have marketplace facilitator legislation, or the legislation varies. Currently a business customer receives one invoice with all state and local transaction taxes and fees listed for multiple states.

For these reasons, we believe that only one entity – either the facilitator or seller – should be responsible for collection and remittance of all the taxes and fees on the transactions covered by marketplace facilitator legislation.

#### **Contractual Arrangements Between the Facilitator and the Seller**

Currently businesses can enter into contractual arrangements when they are partnering on the delivery of products and services that specify who will have responsibility for the collection, remittance and



ultimate liability for federal, state and local taxes. Many of the current marketplace facilitator bills do not allow for the assignment of the tax responsibility to the sellers even when such contractual arrangements are in place. This is especially problematic when the facilitator's billing system can only collect sales and use taxes because it has the effect of barring the communications industry and facilitators from entering into what could otherwise be beneficial business arrangements for selling products over a marketplace.

While we understand the concern raised that facilitators could force sellers to agree to retain responsibility and skirt the intent of the bill, we believe that the laws need to provide for limited instances when the responsibility could remain with the seller under a mutual contractual arrangement with the facilitator. These contractual agreements should be respected when sellers meet certain requirements. These requirements could include sales over certain thresholds, a requirement that the seller is registered in every jurisdiction where the product and service can be sold by the facilitator, and that the seller is in good standing with the impacted taxing jurisdictions.

### ***Waiving the Collection Requirements***

The intent of marketplace facilitator laws is to ensure the states can collect tax on all of its online transactions, thereby ensuring state revenue and a level playing field among retailers. States do not wish to impose an undue burden on taxpayers who already collect and remit tax in the state, nor jeopardize efficient remittance of existing taxes and fees to local or other jurisdictions. Lastly, states do not wish to cause confusion to customers on their invoices for services.

In certain instances, when agreed to by both the marketplace facilitator and the marketplace seller, it may be best to implement an automatic, objective waiver process whereby if the marketplace seller:

1. Has annual U.S. gross sales over \$1 billion, including the gross sales of any related entities;<sup>1</sup>
2. Provides evidence to the marketplace facilitator that it is registered under [cite code section] in this state and also registered to collect sales and use tax in every state where the product or service can be sold; and,
3. Notifies [the Department] in a manner prescribed by [the Department] that the marketplace seller will collect and remit all applicable taxes and fees on its sales through the marketplace and is liable for failure to collect or remit applicable taxes and fees on its sales.

### ***6. Marketplace seller economic nexus threshold calculation***

*Should the marketplace seller, in determining whether it has exceeded the state's economic nexus threshold, be able to exclude its facilitated sales (which the marketplace facilitator/provider is responsible for collecting tax on) and only count its direct remote sales?*

AT&T has no comment related to economic nexus threshold calculation.

### ***7. Remote Seller sales/use tax economic nexus threshold issues (AT&T #5)***

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<sup>1</sup> Note: InstaCart objected to this subsection at the last NCSL meeting. AT&T is indifferent to the removal of a company size threshold.



*Should the sales volume economic nexus threshold be limited only to taxable sales?*

*Should the "transactions" economic nexus threshold be eliminated?*

*See NACSP suggestions under "Thresholds for Collection Obligation for Small Retailers."*

AT&T has no comment related to remote seller economic nexus threshold issues.

## **8. Certification requirement**

*Should states develop a certification process for marketplace facilitator/providers?*

*How does the marketplace seller know if the marketplace facilitator/provider has collected? Should the marketplace facilitator/provider be required to provide a certification or report to the marketplace seller?*

*See NACSP suggestions under "Providing Software to Remote Sellers."*

AT&T has no comment related to the certification requirement.

## **9. Information sharing**

*Should states develop information sharing networks to assist in identifying noncompliant remote sellers and marketplaces?*

AT&T has no comment related to information sharing.

## **10. Taxability determination (AT&T #9)**

*Should states publish clear guidance identifying their sales/use tax impositions and exemptions, so remote sellers and marketplaces can more easily determine the taxability of their products?*

*See NACSP suggestions under "Determination of Taxability."*

Yes, the taxability matrices like those found for Streamlined Sales Tax member states are helpful to all taxpayers for collecting and remitting tax and simplifying the process.

## **11. Return simplification (AT&T #8)**

*Can the sales reporting on returns and recordkeeping requirements, as between the marketplace facilitator/provider and marketplace seller, be simplified and clarified? How does the marketplace seller properly report facilitated sales: taken as a deduction, claimed as an exemption, or not reported at all on return? Can the marketplace facilitator/provider return be simplified and consolidated?*

*See NACSP suggestions under "Return Filings" and "Remittances."*

Returns should be simplified as much as possible. Marketplace facilitators should report all sales on one return, with recordkeeping requirements to reconcile facilitated sale with direct sales. Marketplace sellers should not have to report facilitated sales at all, only sales for which tax has been collected. Separate recordkeeping can reconcile facilitated sales from direct sales, if any, for which tax was collected from the customer.

## **12. Foreign sellers**

*Should states publish clear guidance for foreign sellers with economic nexus needing to register to collect? Should states develop enforcement strategies concerning noncompliant foreign sellers?*



AT&T has no comment regarding foreign sellers.

### **13. Local sales/use taxes (AT&T #6)**

*For “home rule” states that have locally administered local sales/use taxes, what is the best approach to address Due Process/Commerce Clause concerns: (a) use of a “blended” state and local rate that remote sellers can use (such as the Alabama Simplified Sellers Use Tax System); or (b) destination sourcing of both interstate and intrastate sales? For (a), how should “remote seller” entitled to use the blended rate be defined, and do in-state sellers have any discrimination claim? Should the economic nexus threshold apply at the local jurisdiction level?*

*See NACSP suggestions under “Tax Rates” and “Local Jurisdiction Boundary Tables.”*

To the extent that a state simplifies its local sales/use tax filing for marketplace facilitator transactions, that same simplification should be extended to marketplace sellers. It would vastly improve filing simplicity to have local taxes and fees remitted on one state return.

### **14. Other - Class action lawsuit protection (AT&T #4)**

*Many marketplace facilitator/provider collection statutes include for marketplace facilitator/providers protection against class action lawsuits for overcollection of tax. Should this protection be extended to marketplace sellers, or sellers in general? Also, should protection against qui tam lawsuits be included (if the state otherwise permits qui tam lawsuits)?*

State laws, including marketplace facilitator laws, press private parties into the service of the state by requiring them to collect and remit taxes due from customers involuntarily. The law contains an efficient and clear method of enforcing the tax laws, by allowing taxing authorities to audit taxpayers, issue assessments and impose interest and penalties if they discover an under-collection of tax. In the event of an over-collection of tax, state laws permit taxpayers to file refund claims and return refunded amounts to the customers from whom the tax was collected. These procedures allow taxing authorities to determine tax policy as they enforce the tax laws and ensure fairness to taxpayer by providing them with an avenue to appeal assessments or refund denials to administrative tribunals and courts.

Marketplace facilitator legislation should preserve this efficient and fair structure that allows taxing authorities to enforce tax laws and determine tax policy. Such bills should not cede control of tax enforcement and tax policy to plaintiffs’ attorneys whose primary interest is in obtaining large contingency fees through costly, disruptive and time-consuming class action or qui tam lawsuits rather than efficient tax administration. Marketplace facilitator bills should preclude both class action lawsuits and qui tam lawsuits (to the extent otherwise permitted by state law) against either facilitators or sellers.

### **15. Retroactivity**

*Should marketplace facilitator/provider collection laws include a provision prohibiting retroactive enforcement?*

AT&T has no comment.

### **16. Registration**

*Does the state have a simple process for the marketplace seller to de-register once the marketplace facilitator/provider is collecting?*

*See NACSP suggestions under “Registration.”*



AT&T has no comment.

**17. *Assessments and Notices***

*See NACSP suggestions under this topic.*

AT&T has no comment.

**18. *Security Protocols***

*See NACSP suggestions under this topic.*

AT&T has no comment.